In the result, I am of the opinion that on a proper interpretation of section 33 of the Income Tax Act, 1967, question (a) must be answered in the negative, and that on the true construction of section 4(d) of the Act, the answer to question (b) must be in the affirmative. That being so, the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *R. R. Chelvarajah & Co.*

PALANIAPPAN v. RAMANATHAN & ORS.

[O.C.J. (Abdul Hamid J.) April 13, 1972]

[Kuala Lumpur — Civil Suit No. 744 of 1971]

Practice and Procedure — Costs — Stay of action until costs of previous suit paid — Security for costs — R.S.C. 1957, O. 65, r. 6A.

Practice and Procedure — Action — Whether dismissal of previous action for want of prosecution a bar to fresh action.

This was an application by the defendants (a) to stay all further proceedings in the suit until the plaintiff provided security for costs in the sum of $3,500 and had paid the first defendant all costs due and outstanding from him in Civil Suit No. 1138 of 1966 in the High Court at Kuala Lumpur and the appeal therefrom; and (b) that the suit be struck out on the grounds that it was frivolous and/or vexatious and/or was an abuse of the process of the court. It was the applicant's contention that Civil Suit No. 1138 of 1966 was substantially the same as the present action. It was disclosed that the plaintiff took no action to proceed with the matter and in February 1971 the defendants applied to have the suit dismissed for want of prosecution. The plaintiff made no objection and an order was accordingly made on March 22, 1971.

The court had to consider, primarily, whether the present action should or should not be stayed until costs of the previous suit have been paid and whether an order requiring the plaintiff to provide security for costs should also be made.

Held: (1) the effect of the dismissal of the previous action for want of prosecution did not bar the plaintiff from instituting a fresh action.

(2) the principle that where the plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action had been paid, equally applies to a case where there is a dismissal of action for want of prosecution, provided the second action is substantially for the same matter;

(3) this was a proper case for an order that the plaintiff should provide security for costs.

Cases referred to:-

(1) *Martin* v. *Earl Beauchamp* (1884) 25 Ch. D. 12.

(2) *James M'cabe* v. *The Governor and Company of the Bank of Ireland* (1889) 14 App. Cas. 413.

APPLICATION.

M. Shankar for the applicants/defendants.

S. A. Raj for the respondent/plaintiff.

Abdul Hamid J.: This is an application by the defendants that —

(a) All further proceedings in this suit be stayed until the plaintiff provides security for costs in the sum of $3,500 and has paid the first defendant all costs due and outstanding from him to the first defendant in civil suit No. 1138 of 1966 in the High Court at Kuala Lumpur and the appeal therefrom; and

(b) Upon providing such security and payment of the costs aforesaid this summons-in-chambers be restored for hearing the application for an order that this suit be struck out on the grounds that it is frivolous and/or vexatious and/or is an abuse of the process of this court.

It is the applicants' contention that civil suit No. 1138/1966 (hereinafter referred to as "the previous suit") is substantially the same as the present action.

In the previous suit, the plaintiff/respondent claimed that as adoptive son of Valliappa Chettiar and by reason of the adoption, he is one of the beneficiaries of the estate of the deceased. Referring to the appointment of the first defendant/applicant as executor and trustee on February 20, 1961, the plaintiff questioned the validity of the purported will in respect of which the first defendant was so appointed. The plaintiff further raised the issue as to his interest as beneficiary of the deceased's estate by reason of the adoption deed of June 7, 1962. He also alleged that the first defendant refused to hand over the estate to him. The other allegations relate to the power of the first defendant as executor and trustee to sell the property of the estate, the first defendant's careless and reckless handling of the estate in particular the sale of two rubber estates in Rawang, the attempt to sell similar properties in India, the attempt to sell below market value the properties in Kuala Lumpur and the closure of the moneylending business of the said estate. The plaintiff prayed that —

(a) a receiver for the estate of RM.P.RM.P. Valliappa Chettiar, deceased be appointed;

(b) the said defendant do forthwith hand over to the said receiver the entire movable and immovable properties of the estate of the said deceased and/or that the said receiver shall forthwith take over the entire possession and control of the said estate and shall be responsible for the preservation and management of the said estate pending the decision of the court in India in respect of the validity or otherwise of the will purported to have been executed by the said deceased;

(c) such receiver upon such decision by the court shall apply to this court for directions as regards the distribution of the estate of the said deceased;

(d) that such receiver shall produce or cause to be produced to this court a complete statement of affairs and accounts of the estate of the said deceased and such periodical accounts as may be directed by the court; and

(e) pending the appointment and taking over the possession of the estate of the said deceased an injunction to restrain the defendant or his agent or servant from disposing of or otherwise dealing with the estate of the said deceased.

With reference to the previous suit, it is disclosed that the plaintiff took no action to proceed with the matter and in February, 1971 the defendant applied to have the suit dismissed for want of prosecution. The plaintiff made no objection and an order was made on March 22, 1971 dismissing the action for want of prosecution.

In the present suit, the plaintiff sued in addition to the first defendant, also in the capacity as executor

and trustee of the deceased's estate, two other defendants, the adoptive mother of the plaintiff (wife of the deceased) as second defendant and the daughter of the deceased as the third defendant.

The plaintiff has repeated his earlier allegation that by reason of the adoption, he is one of the beneficiaries of the estate of the deceased. Alternatively he alleges that he is entitled to inherit the share of the properties of his adoptive mother. The plaintiff repeats the allegation concerning the sale of properties in Rawang. In paragraphs 11 to 14 of the statement of claim, the plaintiff raises matters which relate to his adoption under the customs of the deceased's community contending that by reason thereof, he became the sole heir to the properties of the deceased. In paragraph 15, the plaintiff alleges that the first defendant obtained probate as executor and trustee without producing the original will. Paragraph 16 is a repetition of paragraph 4 of the statement of claim in the previous suit. Paragraph 17 states what according to the plaintiff were the directions of the will. It is his contention that as an adopted son, he is entitled to be treated precisely on the same footing as a legitimate child. In paragraph 19, the plaintiff claims that the properties of the deceased are hereditary and ancestral and that he acquires the right of inheritance to the properties of the deceased at the very moment of adoption such that he has the right to claim joint possession and enjoyment.

Almost substantially similar prayers as were set out in the previous suit have been repeated. In addition however, the plaintiff asks for —

(a) accounts from the date of the death of the deceased;

(b) damages for breach of trust; and

(c) that the first defendant should cease to be trustee of the plaintiff's share of the properties to which he is beneficially entitled and that it be transferred to him.

I wish to emphasize that the court will not, at this point, consider whether or not the suit is maintainable on grounds of the suit being frivolous, vexatious or an abuse of the process of the court. Primarily the court will consider whether the present action should or should not be stayed until costs of the previous suit have been paid and whether an order requiring the plaintiff to provide security for costs should also be made.

Mr. M. Shankar in his submission has urged the court to consider the following preliminary issues —

(1) the effect of the dismissal of action for want of prosecution. Can it be a bar to the institution of fresh proceedings?;

(2) if it is no bar, can the plaintiff continue with fresh action without paying all costs already incurred?; and

(3) if he pays costs, can he be allowed to proceed with this action without providing security for costs?

In the light of the authorities cited to me by the counsel for the defendants, I am of the view that the effect of the dismissal of the previous action for want of prosecution does not bar the plaintiff from instituting a fresh action. However, after careful perusal of the affidavits in reply in particular in the light of the allegations made in the statements of claim in the previous as well as the present suit, it seems clear to me that both relate to substantially the same matter. Both the statements of claim do not materially differ in character. It might well be that, in the previous suit, the plaintiff has not only added two other defendants but also based his claim on the acquisition of title to properties by reason of being a member of a Hindu joint family acquiring assigned rights of a natural child. However, I do not find, that, in substance, the plaintiff is now proceeding upon an entirely new and distinct cause of action.

Turning to the law, the necessary question that arises is under what circumstances will the court stay proceedings until costs of the previous action have been paid? Should the court also impose a time limit for the payment of those costs? Mr. Shankar counsel for the defendants cited to me *Martin* v. *Earl Beauchamp*[1] where Cotton L.J. said at page 15 that —

"The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid."

It would also appear from the judgment of Cotton, L.J. that the position would still be the same even if the defendant in the second suit is only one of the defendants in the old suit. Although it would seem that in *Martin* v. *Earl Beauchamp, supra,* there was a failure of the first action whereas in the case under consideration there is a dismissal of action for want of prosecution, there is not the slightest doubt in my mind that the same principle would equally apply provided of course the second action is substantially for the same matter.

Martin v. *Earl Beauchamp, supra,* was approved in the House of Lords in *James M'cabe* v. *The Governor and Company of the Bank of Ireland.*[2] It was held that —

"Where a plaintiff having failed in one action brings in a second action for the same cause of action the second action must be stayed until the costs in the first have been paid."

At page 415/416 Lord Herschell said —

"The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs in the first action had been paid. Now, my Lords, I find that it was laid down in a recent case in the Court of Appeal, *Martin* v. *Earl Beauchamp* that 'the rule is established that where a plaintiff having failed in one action commences a second action for the same matter the second action must be stayed until the costs of the first action have been paid;' and even although the actions were not between precisely the same parties or persons suing in the same capacity, the case was held to be within the rule inasmuch as the plaintiff there was 'suing substantially by virtue of the same alleged title.' It cannot be denied that in the present case the parties are the same, and that the plaintiff is 'suing substantially by virtue of the same alleged title'; and therefore I think that the present case has been properly disposed of in accordance with that rule, which I apprehend is not in any respect confined to the courts in England but applies as well to the courts in Ireland, arising as it does out of the inherent power which resides in the court to prevent a second suit being brought upon the same cause of action until the costs incurred in the first action have been paid."

I would now turn to consider the question of security for costs. Mr. Shankar urged the court to

make an order for security for costs to be provided before the application could be restored for hearing. He is relying upon Order 65 rule 6A of the Rules of the Supreme Court, 1957 which states that —

"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction."

Mr. Shankar also referred to a passage in *Mallal's* Supreme Court Practice page 1064 which says that —

"The rule that security for costs should be given by a plaintiff who ordinarily resides outside the jurisdiction of the court in which the action is brought, and who owns no property in the territory within its jurisdiction, is not an inflexible rule. The power to order security is a discretionary power which must be exercised according to the circumstances of the case."

I should think it is also pertinent to refer to the following passage in *Mallal's* Supreme Court Practice at page 1065 under the sub-heading "Temporarily resident within jurisdiction" —

"The words in the rule 'temporarily resident within the jurisdiction', have an elastic meaning. The real object of the rule is to cover a case in which a foreigner ordinarily resident out of jurisdiction would not be here when he was wanted. In the ordinary case of a local man who could not pay, he would not be ordered to give security for costs, and there is no reason why a foreigner in a similar position should be ordered to give security. *Michiels* v. *Empire Palace Co.*, [1892] W.N. 38; 66 L.T. 132."

I have read very carefully the affidavits filed in connection with this application. The first question that this court has to consider is whether the plaintiff has at all material time been ordinarily resident within or out of jurisdiction. Counsel for the defendants drew my attention to the fact that although in the writ of summons in the action the plaintiff has described himself as residing at 34, Leboh Ampang, Kuala Lumpur, he was not then so resident. It is alleged that after a short stay in Malaysia during the previous suit of 1138/66, the plaintiff left for India in the later part of 1968 and only returned here in June 1971. He again left for India on September 13, 1971. Counsel for the defendants also drew my attention to the fact that the plaintiff grew up during his childhood days in the house of the deceased. The plaintiff on the other hand, averred that though he had lived with his adoptive parents and had spent a considerable period of time in India, he is a citizen of Malaysia. He further stated that he was obliged to reside temporarily in India on account of the litigation involving the estate of Valliappa Chettiar, his adoptive father. He further stated that he made trips to India whenever he was required to do so.

The fact that the plaintiff is a Federal citizen has not been disputed. Though that may well be, I think in considering the question of security for costs, the court should not be influenced by a person's domicile. One of the necessary factors that the court should consider is whether or not he is ordinarily resident within the jurisdiction. For this purpose, it is necessary to consider the merits of that particular case. The circumstances of this case reveal that during the last few years preceding this application, the plaintiff resided mainly in India. He has not specifically denied the allegation by the first defendant that after leaving for India in the later part of 1968, he only returned here in June 1971 and that he left again for India on September 13, 1971.

It is also revealed that in his suit in India, the plaintiff has described himself as residing at P. Alagapuri, Kilasavalpatti Post, Ramanathapuram District.

In view of the circumstances of this particular case, I am unable to arrive at a finding that the plaintiff, even though he is a citizen of this country, is ordinarily resident within jurisdiction. In exercising the court's discretion, I have borne in mind the probability that the effect of the order to provide security may shut out the plaintiff from proceeding with the suit. However, in the light of all the other relevant circumstances especially those that relate to the previous as well as the present suit, the non-existence of any property belonging to the plaintiff within jurisdiction and the existence of a similar suit pending in India, it is, I think, a proper case for an order that plaintiff should provide security for costs to be made.

There is one other matter which I should deal with at this point, that is, whether some limit must be imposed for payment of those costs. Mr. Shankar urged that some limit must be imposed for payment of those costs, failing which fresh action should stand dismissed. He referred to *Seton* on Judgments and Orders, 7th edition page 134/5. In the light of the circumstances of this case, I consider it appropriate that a time limit be imposed.

For reasons which I have stated earlier, I allow the application and order that —

"(a) all further proceedings in this suit be stayed until the plaintiff pays costs of appeal of the previous action in the sum of $2,704.87 and costs in the previous action in the sum of $2,469.50 (or such sum as may be awarded on review) and security for costs in the sum of $2,500 within one month from the date hereof failing which this action shall stand dismissed.

(b) upon payment of sums as aforesaid the summons-in-chambers shall be restored for hearing of the application of the defendants/applicants as contained in prayer (b).

Costs of today's application shall be taxed and paid to the defendants.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Raj & Co.*

PUBLIC PROSECUTOR v. ANTHONY

[R.Cr.J. (Sharma J.) April 20, 1972]

[Ipoh — Criminal Revision No. 19 of 1972]

Criminal Law and Procedure — Revision — Conviction on charge which was baseless — Plea of guilty — Effect of.

The accused was charged under section 27 of the Public Order (Preservation) Ordinance, 1958 for having failed to comply with the condition of an order made by the Chief Police Officer, Perak, on January 25, 1970 under section 13(1) of the said Ordinance. On February 11, 1972 the learned magistrate convicted the accused and sentenced him to six months' imprisonment on his plea of guilty. It was subsequently ascertained that the last declaration by the Minister of Home Affairs made under section 3(3) of the Public Order